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## The Employers' Vicarious Liability in Deviation Cases: Some Thoughts from the Judgment of *Stallion Security v Van Staden* 2019 40 ILJ 2695 (SCA)

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### Abstract

*The crux of this note is on the Supreme Court of Appeal (SCA) decision in Stallion Security v Van Staden 2019 40 ILJ 2695 (SCA). The Stallion Security case dealt with an appeal against a judgment of the High Court that Stallion Security Company was vicariously liable for the conduct of its employee. The High Court held that the employee's unlawful actions were committed for his own purposes, but the killing of the deceased was sufficiently linked to his employment with Stallion Security Company. In the court's view, this causal link meant that Stallion Security Company was vicariously liable for the loss suffered by the deceased's wife. Thus, the court a quo granted judgment in favour of the deceased's wife. This note examines the approach that the SCA adopted in interpreting the vicarious liability of the employer for the unlawful conduct of its employee.*

**Keywords:** Vicarious liability; employer; employee; safe working environment; employment law.

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## INTRODUCTION

The fluidity of the doctrine of vicarious liability has recently come under the spotlight within South African employment law. This interest has attracted and motivated legal professionals and academics to pursue a very elusive and ostensibly important concept of law.<sup>1</sup> There are various reasons to ponder on the elusiveness of the doctrine of vicarious liability, which has been a subject of debate by scholars and courts.<sup>2</sup> In the classical United Kingdom (UK) Supreme Court judgment of *Various Claimants v Catholic Child Welfare Society*,<sup>3</sup> Lord Phillips remarked that "the law of vicarious liability is on the move ... It has not yet come to a stop." Although the recent Supreme Court judgment in *Barclays Bank v Various Claimants*<sup>4</sup> has brought this movement to a jerky stop, it is argued that, in South Africa, the courts have developed the doctrine of vicarious liability in line with the employers constitutional obligation of ensuring that the employees' rights to life, human dignity, freedom, a safe working environment,<sup>5</sup> and their security of person are protected.<sup>6</sup>

In another interesting judgment of *WM Morrison Supermarkets plc (Appellant) v Various Claimants*,<sup>7</sup> the UK Supreme Court of Appeal had to determine the following issues. First, the circumstances under which an employer is vicariously liable for wrongs committed by its employees, and second, whether vicarious liability may arise for breaches by an employee consequent from the duties imposed by the Data Protection Act, 1998. In this case the UK Supreme Court ruled that the employer is not vicariously liable for a deliberate data breach committed by a *former employee*. The decision shows that an employer is unlikely to be liable for a malicious data breach committed by an employee, where his/her wrongful conduct is not *closely connected with his/her tasks at work*. For the purpose of the discussion hereunder the UK Supreme Court judgment is beyond the scope of this case note as it does not "pass the test" of whether the wrongful conduct was *closely connected* with acts the employee was authorised to do in order to impugn vicarious liability on the employer. However, amongst other factors, the principle of *close connection* was used by the SCA in *Stallion Security v Van Staden* to arrive at its finding.

- 1 Cf Wessels "Legal and Public Policy Considerations that Justify Legislative Development of the Law of Delict" 2019 *Fundamina* 199–247; Neethling and Potgieter "Foreseeability: Wrongfulness and Negligence of Omissions in Delict – The Debate Goes on *MTO Forestry (Pty) Ltd v Swart* 2017 5 SA 76 (SCA)" 2018 *Journal for Juridical Science* 145–159; Okpaluba "Prosecutorial Negligence and Negligent Police Investigation: An Analysis of Recent Canadian and South African Case Law (1)" 2018 *Speculum Juris* 34–53; Roederer "The Constitutionally Inspired Approach to Vicarious Liability in Cases of Intentional Wrongful Acts by the Police: One Small Step in Restoring the Public's Trust in the South African Police Services" 2017 *South African Journal on Human Rights* 575–606; Kobrin "Vicarious Liability: Easy to Understand, Difficult to Adjudicate" (2017) 1 May, *De Rebus* <http://www.derebus.org.za/vicarious-liability-easy-understand-difficult-adjudicate/> (accessed 15-04-2020).
- 2 Cf Okpaluba "State Liability for Mutinous Acts of Police and Military Officers: A Critique of Lesotho and Zimbabwe Cases in Light of the Modern Test for Vicarious Liability in South Africa" 2018 *Obiter* 317–344; Barnes "F v Minister of Safety and Security: Vicarious Liability and State Accountability for the Criminal Acts of Police Officers" 2014 *Crime Quarterly* 30–34; Botha and Millard "The Past, Present and Future of Vicarious Liability in South Africa" 2012 *De Jure* 225–253; Brand "Reflections on Wrongfulness in the Law of Delict" 2006 *SALJ* 76 77. See the following judgments in this regard: *K v Minister of Safety and Security* 2005 26 *ILJ* 681 (SCA); *Kern v Minister of Safety & Security* 2005 6 SA 41 (CC); *Luiters v Minister of Safety & Security* 2007 3 *BCLR* 287 (CC); *Minister of Safety & Security v F* 2011 3 SA 487 (SCA); *F v Minister of Safety and Security & Another* 2012 1 SA 536 (CC).
- 3 The wording "The law of vicarious liability is on the move" is "borrowed and adapted" from a quotation by Lord Phillips in *Various Claimants v Catholic Child Welfare Society* 2012 (UKSC) para 19. The words themselves are deconstructed in this contribution to depict the fluidity of different courts' decisions in interpreting and giving content to the doctrine of vicarious liability in South Africa.
- 4 *Barclays Bank v Various Claimants* 2020 (UKSC) 13.
- 5 Section 24 of the Constitution of Republic of South Africa, 1996 provides that everyone has a right to an environment that is not harmful to their health and well-being; and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Cf Tshoose "Employer's Duty to Provide a Safe Working Environment: A South African Perspective" 2011 *Journal of International Commercial Law and Technology* 165–175.
- 6 Cf *Woji v Minister of Police* 2005 1 SA 409 (SCA) para 28.
- 7 *WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondents)* 2020 (UKSC) 12.

Having said that, Kellar argues that the response of the recent UK Supreme Court decisions are likely to raise different viewpoints.<sup>8</sup> He avers that, on the one hand, some will welcome the decision as one which restores sensible boundaries to the runaway principle of vicarious liability. On the other hand, others will lament the decision as a step backwards.

In the South African context, it is argued that Lord Philips' dictum that "the law of vicarious liability is on the move ... It has not yet come to a stop" provides a useful entry point to a consideration of ontologically interpreting, broadening and developing the classical elements of the doctrine of vicarious liability, alongside the spirit and values of the Constitution.<sup>9</sup>

In light of the above prefatory remarks, this note scrutinizes and provides some thoughts on the approach that the SCA adopted in *Stallion Security v Van Staden*,<sup>10</sup> in interpreting the vicarious liability of the employer for the unlawful conduct of its employee in deviation cases.

## 2 THE FACTUAL MATRIX

The SCA judgment of *Stallion Security v Van Staden*<sup>11</sup> was concerned with an appeal against a judgment of the High Court that Stallion Security Company was vicariously liable for the conduct of its employee (Mr Khumalo). Mr Khumalo was a site manager who supervised security at an office block where Mr Van Staden worked.<sup>12</sup> Mr Van Staden was employed as a financial manager, and he often used to work until very late in the day. As the site manager, Mr Khumalo's duties included, *inter alia*, the regular inspection of the security guards on duty, and to make unannounced visits to the premises of the employer after business hours, particularly to ensure that the emergency exits were closed at night.<sup>13</sup>

Due to the nature of his work, Mr Khumalo had been issued with an override key to bypass the biometric security at the office block.<sup>14</sup> Mr Khumalo started to act peculiarly by absconding from work, claiming that he was ill. When asked about his absence from work by Mr Harmse (Risk Manager of Bidvest), he claimed that he was ill and that he was in trouble with loan sharks.<sup>15</sup> It transpired that Mr Harmse requested Stallion Security Company to remove Mr Khumalo from his position. By then, however, Mr Khumalo had been placed on sick leave.

Mr Khumalo knew that Bidvest kept a petty cash box in the office area. On the fateful Monday, Mr Khumalo went to the head office at about midday, armed with a firearm, and noticed that Mr Van Staden was at work. He waited until about 18h00, and then entered the office building through an emergency exit on the second floor.<sup>16</sup> He used his bypass key to gain access to Mr Van Staden's office. At gun point, Mr Khumalo raided the office of Mr Van Staden and attempted to locate the petty cash box.<sup>17</sup> Mr Van Staden articulated to Mr Khumalo that he did not have the safe keys, but persuaded him to accept an electronic transfer of R35 000 from his personal bank account.<sup>18</sup> After this ordeal, Mr Khumalo escorted Mr Van Staden out of the building and to the latter's car. On Mr Khumalo's instructions, Mr Van Staden drove to the vicinity of the Eastgate Shopping Mall, in Johannesburg.

When the car came to a stop near Eastgate Shopping Mall, the anxious Mr Khumalo realised that Mr Van Staden was going to call the police, and he shot and killed Mr Van Staden (the deceased). Upon realising what he had done, Mr Khumalo ran away. Unfortunately, he was apprehended shortly afterwards, but later escaped from custody. Subsequent information led to him being presumed dead.<sup>19</sup>

The deceased's wife (Ms Van Staden) sued both Stallion Security Company and Mr Khumalo

8 Kellar "Vicarious Liability: The New Boundary Dispute" 3 April 2020 *The Guardian* <https://ukhumanrightsblog.com/2020/04/03/vicarious-liability-the-new-boundary-dispute> (accessed 15-04-2020).

9 See *Minister of Safety and Security v Booyesen* 2018 6 SA (CC) para 83 (although this case was dismissed by majority court, as it lacked the threshold requirement of jurisdiction, Zondo J disagreed with the majority judgment, and ruled that this case raised a constitutional matter); *K v Minister of Safety and Security* 2005 9 BCLR 835 (CC) *per* O'Regan K paras 14–20; *S v The Bus & Another* 2003 10 BCLR 1100 (CC) para 28; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 33–41 and para 62.

10 *Stallion Security v Van Staden* 2019 40 ILJ 2695 (SCA) (hereinafter *Stallion Security*).

11 *Stallion Security* para 1.

12 *Stallion Security* para 3.

13 *Stallion Security* para 6.

14 *Stallion Security* *ibid*.

15 *Stallion Security* para 7.

16 *Stallion Security* para 9.

17 *Stallion Security* para 8–9.

18 *Stallion Security* *ibid*.

19 *Stallion Security* para 11.

for delictual damages, claiming loss of support following the death of her husband. Her claim against Stallion Security Company was based on vicarious liability for the wrongdoing committed by Mr Khumalo.<sup>20</sup> In this matter, Ms Van Staden [legal representatives] relied on the causal link between the employment of Mr Khumalo and the murder of the deceased, the risk of abuse posed by his employment, and the contractual duties that Stallion Security Company owed to Bidvest through Mr Khumalo.<sup>21</sup> It was unfortunate that Mr Khumalo was presumed dead when the matter went to trial. In fact, the trial only proceeded against Stallion Security Company.

### 3 THE COURT'S JUDGMENT

The High Court (hereinafter "the HC") held that [although] Mr Khumalo's unlawful actions were committed for his own purposes, but his wrongful act was sufficiently linked to his employment with Stallion Security Company. In the court's view, this causal link meant that Stallion Security Company was vicariously liable for the loss suffered by the deceased's wife (Ms Van Staden). Thus, the court *a quo* granted judgment in favour of the deceased's wife. Aggrieved by the decision of the HC, Stallion Security Company approached the SCA for relief. The SCA was required to examine the test for an employer's vicarious liability, namely that an employer was liable if the employee committed a wrongful act while *wholly or partly* going about the employer's business. Furthermore, the SCA had to consider the qualification to the test, namely that an employer will not be liable where the employee committed the act while wholly concerned with his/her own purposes, unless there was a *sufficiently close link* between the employee's act and the business.<sup>22</sup>

In summation, the SCA having satisfied itself that the requirements of vicarious liability have been complied with, it then considered the strength of the sufficiently close link in the present case based on two factors. First, ruling *against* sufficient closeness, the SCA held that Mr Khumalo had carried out the actions described while on sick leave, outside the workplace, and with a firearm unconnected to the business. Second, deciding in *favour* of sufficient closeness, the court held that, by employing Khumalo, the Stallion Security Company had enabled him to enter the office, thereby creating the risk that he might abuse his powers. Henceforth, the court ruled that it was Stallion Security Company's business to ensure Van Staden's safety and to safeguard his constitutional rights (e.g. his right to life, human dignity, freedom and to ensure that his security of person was protected). After weighing the pros and cons of these factors, the SCA concluded that a sufficiently close link was established to hold the employer (Stallion Security Company) vicariously liable.

### 4 COMMENTS AND ANALYSIS

The SCA ought to be commended for its comprehensive interpretation and application of the doctrine of vicarious liability in the context of the employer's accountability for the unlawful conduct of its employee. It is submitted that this is a *locus classicus* judgment for deciding whether the employer is vicariously liable for the unlawful conduct of its employee in deviation cases.

In this case, the SCA was called upon to revisit the test to use when establishing whether the wrongful act committed by the employee within the course of his/her employment was sufficiently connected to the business of the employer, in order to render the employer vicariously liable. In other words, the SCA was required to determine whether an employer could be held vicariously liable for an act of murder perpetrated by its employee in cases where the employee acted out of his/her own accord and not serving the interest of the employer.

In arriving at its decision, the SCA referred to several authorities on the subject, which will be analysed in the next part. Conversely, before commenting on and analysing the decision of the SCA and relevant authorities, it is important to refer to the general principles applicable to the doctrine of vicarious liability. Vicarious liability is generally defined as the strict liability of one person for the delict of another.<sup>23</sup> In other words, a person may be held liable for the wrongful act or omission of another, even though the former did not strictly engage in

<sup>20</sup> *Stallion Security* para 12.

<sup>21</sup> *Stallion Security* para 13.

<sup>22</sup> *Stallion Security* para 19–21.

<sup>23</sup> Knobel *Law of Delict* ed (2010) 365.

any wrongful conduct.<sup>24</sup> However, before the employer can be held vicariously liable for the wrongful acts of his/her employee, certain requirements must be met.

These requirements are threefold.<sup>25</sup> First, a contract of employment must exist. This means that there must be a legally enforceable agreement (either written or oral) between the employer and employee which defines the terms and conditions of employment.<sup>26</sup> In law the legal relationship between the parties may be extracted from, *inter alia*, a construction of the contract which have or might have been concluded.<sup>27</sup> In *Goldberg v Durban City Council*,<sup>28</sup> the court held that in seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it. Although there is no legal requirement to conclude a written contract of employment, there is a legislative requirement for employers to provide employees with written particulars of employment.<sup>29</sup> In sum, the question of whether a person is a contractor or an employee poses a fundamental jurisdictional problem when a dispute is referred under the Labour Relations Act, 1995 (LRA).<sup>30</sup> Nevertheless, in this case the SCA was satisfied that Mr Van Staden ("the deceased") had passed the test of being an employee.

Second, a delict ought to have been committed by the employee. The notion of an "employee" has been the subject of debate for many years,<sup>31</sup> but I will not venture into this debate because of its problematic nature and the in-depth analysis that would be required. In short, the concept "employee" is defined as any person (excluding independent contractor) who works for another person or for the state, or who assists in conducting the business of the employer in any way and receives, or is entitled to receive, any remuneration.<sup>32</sup> The courts have used the presumption in section 200A of the LRA. By using these factors, one is able to ascertain whether a particular relationship is one of employment, or similar to it.

The implication of not meeting the requirements of the definition of an employee is that several categories of non-standard employees or atypical workers, such as independent contractors, home workers, dependent contractors, workers engaged in gig-economy, freelancers and some categories of consultants, are unable to rely on the protection offered by the labour laws.<sup>33</sup> It is submitted that this statutory exclusion from the notion of an employee might present opportunities for the courts and academics to adopt innovative approaches

24 See para *F v Minister of Safety & Security* 2012 3 BCLR 244 (CC) para 40. Although in a totally different context, the dicta of Mogoeng, J (as he then was) in *F v Minister of Safety and Security* in paras 57 to 61 and Froneman, J, in paras 121 to 124 should be appreciated. In adjudicating the element of wrongfulness, constitutional values should be considered during the evaluative assessment, in particular the norm of accountability.

25 Cf *Minister of Police v Rabie* 1986 1 All SA 36; *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 4 SA 759 (A); and *Minister of Police v Mbilini* 1983 3 SA 705 (A).

26 *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC) para 17.

27 *Smit v Workmen's Compensation Commissioner* (1979) SA 51 (A) 64B; *Liberty Life Association of Africa Ltd v Niselow* 1996 17 ILJ 673 (LAC) 683D-E.

28 *Goldberg v Durban City Council* 1970 3 SA 325 (N) at 331B-C; *Dempsey v Home & Property* 1995 16 ILJ 378 (LAC).

29 Section 29(1) of the Basic Conditions of Employment Act 75 of 1997.

30 Cf *Niselow v Liberty Life Association of Africa* 1998 19 ILJ 752 (SCA); *SABC v McKenzie* 1999 20 ILJ 585 (LAC) and *Dempsey v Home & Property* 1995 16 ILJ 378 (LAC); *K v Minister of Safety & Security* 2005 9 BCLR 835 (CC); *State Information Technology Agency (SITA) (Pty) Ltd v CCMA & Others* 2008 29 ILJ 607 (LAC); Maloka "Penetrating the Opacities of Form: Unmasking the Real Employer Remains Labour Law's Perennial Problem" 2018 *Speculum Juris* 140–152.

31 Cf *Borcherds v CW Pearce & J Sheward t/a Lubrite Distributors* 1993 14 ILJ 1262 (LAC); *White v Pan Palladium* 2005 6 SA 384 (LC); *Discovery Health Limited v CCMA & Others* 2008 7 BLLR 633 (LC); *SA National Defence Union v Minister of Defence & Another* 1999 4 SA 469 (CC); *Rumbles v Kwa Bat Marketing (Pty) Ltd* 2003 24 ILJ 1587 (LC); *Denel v Gerber* 2005 26 ILJ 1256 (LAC) para 93; *Kylie v CCMA & Others* 2008 29 ILJ 1918 (LC) para 74; *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town & Others* 2002 3 SA 1 (CC) para 40; *NUMSA & Others v Bader Bop (Pty)Ltd & Another* 2003 24 ILJ 305 (CC). See also Waas and Van Voss *Restatement of Labour Law in Europe: The Concept of Employee* eds (2017) 1–770; Maloka and Okpaluba "Making your Bed as an Independent Contractor but Refusing 'to Lie on It': Freelancer Opportunism" 2019 *SA Merc LJ* 54–75; Maloka "Penetrating the Opacities of Form: Unmasking the Real Employer Remains Labour Law's Perennial Problem" 2018 *Speculum Juris* 140–152; Vettori "The Extension of Labour Legislation Protection to Illegal Immigrants" 2009 *SA Merc LJ* 21; Cohen "Placing Substance Over Form: Identifying the True Parties to an Employment Relationship" 2008 *ILJ* 863.

32 Section 213 of Labour Relations Act 66 of 1995.

33 *Grogan Employment Rights* 3 ed (2019) 46–50. In *South African National Defence Union v Minister of Defence* 1999 6 BCLR 615 (CC) para 48. In this case the court had to consider whether soldiers are workers and relied on the fact that the right to fair labour practices in s 23(1) of the Constitution is available to everyone, thus by implication also soldiers.

to ensure that these workers are included in the second leg of the test of vicarious liability enunciated above. It is argued that using the approach of defining an employee, which was followed by the court in *South African National Defence Union v Minister of Defence* and other judgments,<sup>34</sup> police/soldiers who are reservists also ought to fall within the definition of an employee for the purposes of imputing vicarious liability to their employer.

Third, a delict should have been committed within the scope of the employee's employment.<sup>35</sup> Delict is defined as the wrongful and culpable act of a person that causes harm to another.<sup>36</sup> The requirements of wrongfulness, fault, causation and harm must be present in order to classify conduct as delict.<sup>37</sup> Millard and Bascerano,<sup>38</sup> argue that "since employers, through their activities, not only create the risk of harm to others but also enjoy the profits resulting from the labour of their employees, employers should be held liable for the wrongful acts of their employees." Similarly, Scott acknowledges that this requirement implies that "a sufficiently close connection should exist between the wrongdoing committed by the employee and the employer's business."<sup>39</sup>

In addressing the element of wrongfulness, the SCA in *Hawekwa Youth Camp & Another v Byrne*,<sup>40</sup> confirmed the legal position as follows:

... negligent conduct which manifests itself in the form of a positive act causing physical harm to the property or person of another is *prima facie* wrongful. By contrast, negligent conduct in the form of an omission is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages.<sup>41</sup>

Generally, if these three factual elements were found to be complied with, vicarious liability would be imputed to the employer.<sup>42</sup> According to Van Niekerk *et al*, the third party claimant has the right to choose against whom to institute the claim.<sup>43</sup> Considering the above factors, a problem always arises in situations where an employee commits an intentional wrongful act which is entirely for his/her own purposes (as in *Stallion Security* case). In fact, this position warrants a scrutiny of the jurisprudence of the courts in as far as the approach that has been adopted in dealing with this aspect.

For that reason, the standard test for vicarious liability was formulated in *Minister of Police v Rabie*,<sup>44</sup> and subsequently validated by the Constitutional Court in *K v Minister of Safety and Security*.<sup>45</sup> In *Minister of Police v Rabie*, the employee was a mechanic in the employ of the South African Police Service. He was off duty, dressed in plain clothes, in his private vehicle and acting in pursuance of his private interests, when he fraudulently claimed to be a police officer and wrongfully and unlawfully arrested the victim and charged him with house-breaking.

34 *SA National Defence Union v Minister of Justice & Another* 1999 20 ILJ 2265 (CC).

35 *Media 24 Ltd & Another v Grobler* 2005 7 BALLR 649 (SCA) para 64. It was found that there was a negligent breach by the employer of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees. See also Okpaluba and Osode *Government Liability: South Africa and the Commonwealth* (2010) 334.

36 *Cf Neethling et al Law of Delict* 7 ed (2015) 25; Scott "Revisiting the Elements of Delict – The Mashongwa Judgments" 2016 THRHR 551–554; Van der Walt and Midgley *Principles of Delict* 4 ed (2016) 92.

37 *Knobel Law of Delict* ed (2010) 4.

38 Millard and Bascerano "Employers' Statutory Vicarious Liability in Terms of the Protection of Personal Information Act" 2016 PELJ 16.

39 Scott "Intentional Delicts of Police Officers: A Hiccup from the Supreme Court of Appeal, *Minister of Safety & Security v Booysen* 2018 6 SA 1 (CC)" 2017 TSAR 872.

40 *Hawekwa Youth Camp & Another v Byrne* 2010 6 SA 83 (SCA).

41 *Ibid* para 22.

42 See *Jordan v Bloemfontein Transitional Local Authority & Another* 2004 3 SA 371 (SCA); *Minister van Veiligheid en Sekuriteit v Phoebus Apollo Aviation BK* 2002 5 SA 475 (SCA); *Govender v Minister of Safety and Security* 2001 4 SA 273 (SCA).

43 Van Niekerk *et al Law@work* 4 ed (2017) 91.

44 *Minister of Police v Rabie* 1986 1 All SA 361 (A) para 3.

45 *K v Minister of Safety and Security* 2005 6 SA 419 (CC) (hereinafter 'K').

The court held that the employer was vicariously liable for the employee on the basis of the *creation of risk*, and that the dominant question to be asked was whether the employee's acts fell within the risk created by the state. In answering this question, the court concluded in the affirmative.<sup>46</sup>

Furthermore, the court in *Minister of Police v Rabie*,<sup>47</sup> considered other factors, such as whether liability should lie with the employer, rather than concealing the decision surrounding *scope of employment* and *mode of conduct*; whether the wrongful act is sufficiently related to the conduct authorised by the employer, in order to justify the employer's vicarious liability (whether a connection exists between the creation or enhancement of a risk and the wrong that stems from the conduct); the opportunity that the employer afforded the employee to abuse his/her power; the extent to which the wrongful act may have furthered the employer's aims; the extent to which the wrongful act was related to the friction/confrontation/intimacy inherent in the employer's enterprise; the extent of power conferred on the employee in relation to the victim; and the vulnerability of potential victims due to an employee's wrongful exercise of his/her power.<sup>48</sup>

Subsequent to the *Minister of Police v Rabie* case, the Constitutional Court in *K v Minister of Safety and Security*,<sup>49</sup> reasoned that in terms of this approach, it is clear that there are two questions to be asked. The first, is whether the wrongful acts were committed solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. In the court's view, even if it is answered in the affirmative, the employer may still be vicariously liable if the second question, which is an objective one, is answered in the affirmative. This enquiry is whether, even though the acts committed were solely for the purposes of the employee, a sufficiently close link still exists between the employee's acts for his/her own interests and purposes, and the business of the employer.<sup>50</sup>

Accordingly, the court concluded that there was a close connection between the wrongful conduct of the policemen and the nature of their employment.<sup>51</sup> The court further held that the opportunity to commit the crime would not have arisen if it was not for the trust that the applicant placed in them because they were policemen, a trust which harmonises with the constitutional mandate of the police and the need to ensure that this mandate is successfully achieved.<sup>52</sup> Finally, the court held that the respondent was vicariously liable for the conduct of the policemen.<sup>53</sup>

Similarly, in *F v Minister of Safety and Security*,<sup>54</sup> where a police officer on standby duty assaulted and raped a young woman, the Constitutional Court held that the police officer was sufficiently closely linked to the operations of the South African Police Service (SAPS).<sup>55</sup> In this regard, the majority of the Constitutional Court held that the SAPS was vicariously liable for the delict of the police officer, despite the fact that the police officer acted in his own selfish interests, and the fact that he was on standby duty at the time of committing the delict.<sup>56</sup>

In view of the above discussion, the SCA in *Stallion Security* appreciated the fact that in cases where the employee commits a delict whilst solely or partially carrying out the business of the employer, the application of the principle of vicarious liability generally presents no problem.<sup>57</sup> However, the difficulty arises in cases where the employee commits a delict entirely for his/her own purposes.

46 *Minister of Police v Rabie* para 10–11 (hereinafter 'R').

47 *Ibid* para 7–9.

48 *Ibid* 10.

49 *K* para 32.

50 *Ibid*.

51 *Ibid* para 57.

52 *Ibid* K.

53 *Ibid* para 58.

54 *F v Minister of Safety and Security and Others* 2012 1 SA 536 (CC) (hereinafter 'F').

55 *Ibid* 550D–557B.

56 *F* at 557B, 557D and 557E-G.

57 *Stallion Security* para 15.

In answering this question, the SCA held that the common-law test for vicarious liability in deviation cases, as developed in *Minister of Police v Rabie* and subsequent judgments, ought to be applied to new sets of facts in each case, in light of the spirit, purport and objects of the Constitution.<sup>58</sup> According to the court, the test is one which encompasses both a factual assessment, namely the question of the subjective intention of the perpetrators of the delict, as well as a consideration which raises a question of mixed fact and law, namely the objective question of whether the delict committed is sufficiently connected to the business of the employer to render the employer liable.

Furthermore, the SCA in *Stallion Security* emphasised that a sufficiently close link must exist between the wrongful act of the employee on the one hand, and the business or enterprise of the employer on the other. The SCA acknowledged that the development of vicarious liability was intended to provide redress to a victim against an employer, even though the wrongful act did not, in any manner, constitute the exercise of the duties or authorised acts of the employee,<sup>59</sup> if it was sufficiently linked to the business or enterprise of the employer. Therefore, references to a link with the duties, authorised acts or employment of the employee should be avoided in this context.<sup>60</sup>

On the question of when a sufficiently close link with the business of the employer could be established in matters of this kind, the SCA held that more than a mere opportunity or "but for" causal link is required.<sup>61</sup> According to the court, this would depend on the factual circumstances and normative considerations relevant to each case, and on whether, in light thereof, the rule should be further developed.

Linking this analysis to *Stallion Security* judgment, the SCA stated that the employer (Stallion Security Company) enabled Mr Khumalo to enter into and exit from the office area without detection or concern on the part of Bidvest. Furthermore, Mr Khumalo was enabled by his intimate knowledge of the layout and security services at the premises; the instruction to make unannounced visits to the premises at any time; his knowledge that the deceased would be working late; and, most importantly, his possession of the override key to the office area. These factors, according to the SCA, created a material risk that Mr Khumalo might abuse his powers. This risk rendered the deceased vulnerable and led to the robbery and subsequent murder.

The SCA further noted the role played by risk of harm created by the business of the employer.<sup>62</sup> The court cited a passage from *Feldman (Pty) Ltd v Mall*,<sup>63</sup> in holding that a deviation from authorised duties, which is in effect neglect of a duty, could in certain circumstances be closely connected to the employment.<sup>64</sup> According to the court, this would be the case if the omission led to mismanagement of the master's affairs, and if this, in turn, led to damages to the third party. The court further held that the employer could thus be liable for the intentional wrongdoing if this had a negative impact on the employee's duties, but not if the third party suffered damages as a result of an act of the employee that was unconnected to the work of his/her employer. For the purposes of this discussion, the relevant parts of the court judgment read as follows:

...a master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty.<sup>65</sup>

In addition, in considering whether the employer was liable for a delict which was committed by an employee within the scope of his/her employment, the court referred to the case of *Minister of Police v Rabie* and outlined the principles for determining whether an employer is

58 *Stallion Security* para 45.

59 *Stallion Security* para 19.

60 *Ibid.*

61 *Stallion Security* para 21.

62 *Ibid.*

63 *Feldman (Pty) Ltd v Mall* 1945 AD 733.

64 *K* para 47–48.

65 *Feldman* para 741.

vicariously liable for an employee's unauthorised intentional wrongdoing.<sup>66</sup>

Turning for a moment to comparative law, the SCA did not end here, as it also considered the judgments in other jurisdictions, such as Canada and the United Kingdom, and concluded that the creation of risk is an important consideration in determining vicarious liability of an employer under the "close connection" test.<sup>67</sup>

The SCA approved the established principles of determining vicarious liability of an employer, as set out in *Bazley v Curry*,<sup>68</sup> *Jacobi v Griffiths*<sup>69</sup> and *Lister v Hesley*.<sup>70</sup> It further held that an enquiry should not be limited to a mere "but for" causal link. Therefore, the following factors were considered: (a) whether liability should lie with the employer, rather than concealing the decision surrounding "scope of employment" and "mode of conduct"; (b) whether the wrongful act is sufficiently related to the conduct authorised by the employer, in order to justify the employer's vicarious liability (whether a connection exists between the creation or enhancement of a risk and the wrongdoing that stems from the conduct); (c) other factors such as: the opportunity that the employer afforded the employee to abuse his/her power; the extent to which the wrongful act may have furthered the employer's aims; the extent to which the wrongful act was related to the friction/confrontation/intimacy inherent in the employer's enterprise; the extent of power conferred on the employee in relation to the victim; and the vulnerability of potential victims due to an employee's wrongful exercise of his/her power. It is important to note that, in some cases, the courts have exonerated employers from liability, based on the finding that there is no *sufficient connection* between the unlawful conduct of the employee towards his/her employer.<sup>71</sup>

Conversely, the SCA in *Stallion Security* shows that it is now firmly established in Canada and the United Kingdom that the creation of a risk *based on the merits of each case* (emphasis added), is an important consideration in determining vicarious liability of an employer under the *close connection test*.<sup>72</sup>

In view of the above factors, the SCA in *Stallion Security* arrived at the conclusion that Khumalo's wrongful act was solely for his own purposes.<sup>73</sup> Furthermore, Stallion Security Company furnished Khumalo with much more than a mere opportunity to commit the wrongdoings in question.<sup>74</sup> According to the court, he was enabled by his intimate knowledge of the layout and security services at the premises.<sup>75</sup> Finally, in its judgment, the SCA dismissed Stallion Security's appeal and found that the employer ought to be vicariously liable for the unlawful conduct of its employee (Mr Khumalo), as a sufficiently close link had been established between the business of Stallion and the death of the deceased.<sup>76</sup>

66 See also the judgment of the Constitutional Court in *Minister of Safety and Security v Booyesen* 2018 6 SA (CC), in particular descending judgment of Zondo DCJ in para 66–91.

67 *Stallion Security* para 29–31. For a detailed discussion on contemporary comparative developments on the principle of vicarious liability, see Okpaluba and Osode *Government Liability* 360.

68 *Bazley v Curry* 1999 2 (SCR) 534 (Canada).

69 *Jacobi v Griffiths* 1999 2 (SCR) 570 (Canada). Both the decisions of *Bazley v Curry* and *Jacobi v Griffiths* sought a review of the policy factors underpinning the law of vicarious liability and demonstrate the view that the most significant of these is "enterprise liability".

70 *Hall Lister v Hesley Hall* 2001 (UKHL) 22 para 25 (United Kingdom). In this case, the House of Lords reformed the law on vicarious liability, in the context of a claim arising over the intentional infliction of harm, by introducing the "close connection" test. The rationale for the court decision was based on the need to facilitate recovery of damages on the part of victims of child abuse.

71 In *Ogwang v Minister of Police* (10305/2017) [2019] ZAGPPHC 625 (25 October 2019), which dealt with claim for damages resulting from an assault on the plaintiff by a person allegedly acting within the course and scope of his employment with the South African Police. In this case there was no evidence that the policeman was on duty and consequently his conduct was not sufficiently connected to his employment to render the state liable for damages (see para 38–39). See also *Shelbourne v Cancer Research UK* 2019 (EWHC) 482; *Tanja Ivic v Velibor Boro Lakovic Ontario Court of Appeal Lakovic* 2017 (SCR) 44 (Canada); *Burnett or Grant v International Insurance Company of Hanover Ltd* 2019 (CSIH) 9 PD 4/16 (Scotland); Cf *WM Morrison Supermarkets Plc v Various Claimants* 2020 (UKSC) 12; *Barclays Bank Plc (Appellant) v Various Claimants* 2020 (UKSC) 13.

72 *Stallion Security* para 31.

73 *Stallion Security* para 33.

74 *Stallion Security* para 36.

75 *Ibid.*

76 *Stallion Security* para 38.

## 5 CONCLUSION

In light of the above discussion, it is clear that the requirements of vicarious liability were met in the *Stallion Security* case, hence the employer was found to be vicariously liable for the acts of its employee. In conclusion, it is submitted that the SCA judgment in *Stallion Security* is to a certain extent akin to Lord Phillips' remark that "the law of vicarious liability is on the move ... It has not yet come to a stop." As articulated by the SCA, the doctrine of vicarious liability, as developed by the courts in *Minister of Police v Rabie and K v Minister of Safety and Security*, should be further developed to recognise that the creation of risk of harm by an employer may, in an appropriate case, constitute a relevant consideration in determining whether there is a sufficiently close link between the harm caused by the employee and the business of the employer.<sup>77</sup> The SCA further held that the risk created by the employer ought to be determined objectively.<sup>78</sup>

Lastly, it is submitted that the SCA decision is commendable as it has provided much needed clarity on the scope of employers' vicarious liability for the unlawful conduct of employees in deviation cases. Finally, this judgment demonstrates that the law is never static,<sup>79</sup> but is rather flexible<sup>80</sup> and dynamic,<sup>81</sup> in responding to the normative conditions in society.<sup>82</sup>

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77 *Stallion Security* para 32.

78 *Ibid* [emphasis added].

79 See Pillay in *Laser Junction (Pty) Ltd v Fick* 2017 38 ILJ 2675 (KZD) para 25.

80 Muller-Bohler *et al Making the Road by Walking: The Evolution of the South African Constitution* (2018) 155–177; O'Regan "Cultivating a Constitution: Challenges Facing the Constitutional Court in South Africa" 2000 *Dublin University Law Journal* 18.

81 Eskridge "Dynamic Statutory Interpretation" 1987 *Pennsylvania Law Review* 1482–1498.

82 Harris *An Introduction to Law* 8 ed (2015) 4; K para 44.